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SOWELL GRAY STEPP & LAFFITTE, LLC
ATTORNEYS AND COUNSELORS AT LAW

ORS .1

April 11, 2005

VIA HAND-DELIVERY:

Charles L.A. Terreni, Chief Clerk & Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

RECORDED
2005 APR 11 PM 1:11
SC PSC
COMMUNICATIONS

Re: Petition to Establish Generic Docket to Consider Amendments to
Interconnections Agreements Resulting From Changes of Law
SC PSC Docket No. 2004-316-C
SGS&L File No. 5665-1506

Dear Mr. Terreni:

Please allow this letter to serve as ITC^DeltaCom Communication, Inc's ("DeltaCom")Comments pursuant to the Public Service Commission Directive issued April 5, 2005. DeltaCom seeks to have this Commission defer its decision until the 11th Circuit Court of Appeals issues a decision concerning the Order in the United States District Court for the Northern District of Georgia issued April 5, 2005. DeltaCom and the other parties have been informed by the Clerk's office of the 11th Circuit Court of Appeals a decision should be issued no later than this Friday, April 15, 2005.

Alternatively, the Commission could order BellSouth to extend its implementation deadline beyond April 17 pursuant to BellSouth's last Carrier Notification. As the Commission knows, BellSouth and the parties will not be harmed by delaying any BellSouth self-imposed deadline until the 11th Circuit renders an opinion.

Additionally, DeltaCom urges this Commission to continue its analysis of the facts and legal issues presented in this docket. DeltaCom recognizes the Commission should review the 11th Circuit's actions; however, the Commission must undergo the legal analysis presented before it by the parties. Permitting BellSouth to take unilateral action without regard to its contractual requirements potentially could lead to an appeal of the Commission's decision in the federal courts of South Carolina.

DeltaCom encloses the appeal filed with the 11th Circuit Court of Appeals. The brief highlights the deficiencies in the Court's Order to impose an injunction without meeting the legal elements required for an injunction.

Robert E. Tyson, Jr.
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4/11/2005
Page 2 of 2



SOWELL GRAY STEPP & LAFFITTE, LLC
ATTORNEYS AND COUNSELORS AT LAW

DeltaCom urges the Commission to grant the Petition for Emergency Relief as requested by the joint petitioners. Alternatively, DeltaCom requests the Commission defer its decision until the 11th Circuit rules. Furthermore, DeltaCom requests the Commission concur with the positions taken by the Office of Regulatory Staff, the joint petitioners, CompSouth, and DeltaCom.

Thank you for your assistance with this matter. By copy of this correspondence I am serving all parties of record and enclose my certificate of service to that effect.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert E. Tyson, Jr.", with a long horizontal flourish extending to the right.

Robert E. Tyson, Jr.

RETjr:alw

Enclosures

cc: All Parties of Record

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

BELLSOUTH TELECOMMUNICATIONS, INC.,
Plaintiff-Appellee,
 v.
 MCIMETRO ACCESS TRANSMISSION SERVICES LLC, et al.
Defendants-Appellants.

No. _____

RECEIVED
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 SO. FLORIDA JUDICIAL
 COMMISSION

CONSENT MOTION OF MCIMETRO ACCESS TRANSMISSION SERVICES LLC AND JOINT DEFENDANTS TO SET AN EXPEDITED SCHEDULE

Pursuant to Federal Rule of Appellate Procedure 8, MCImetro Access Transmission Services LLC (“MCI”) and ITC^DeltaCom Communications, Inc., Business Telecom, Inc., Cbeyond Communications, LLC, LecStar Telecom, Inc., Talk America, Inc., US Carrier Telecom, Dieca Communications, Inc. d/b/a Covad Communications Corp., Southern Digital Network, Inc. d/b/a FDN Communications, BroadRiver Communication Corporation, NuVox Communications, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Atlanta, LLC, KMC Telecom Holdings, Inc., KMC Telecom V, Inc., and KMC Telecom III, LLC (“Joint Defendants”) hereby jointly file this Consent Motion to Set an Expedited Schedule and would show the Court as follows:

On April 5, 2005, the United States District Court for the Northern District of Georgia (Cooper, J.) entered a preliminary injunction in favor of BellSouth Telecommunications, Inc. ("BellSouth") enjoining an order of the Georgia Public Service Commission ("GPSC"). MCI and Joint Defendants have already filed notices of appeal seeking review of the District Court's decision granting the preliminary injunction. MCI and Joint Defendants also sought a stay of the preliminary injunction from the District Court, which the District Court denied. Today MCI and Joint Defendants have filed in this Court separate Motions for a Stay Pending Appeal and for Expedited Appeal. Simultaneously, MCI and Joint Defendants are also filing this Consent Motion to Set an Expedited Schedule for consideration of their stay requests.

Expedited consideration of MCI's and Joint Defendants' requests for a stay pending appeal is necessary because the normal timetable for responses to (and a decision upon) the motions would be inappropriate in this case. Under the District Court's preliminary injunction, BellSouth will be able to stop processing crucial service orders that MCI and Joint Defendants require in order to provide local telephone service in Georgia. As set forth in greater detail in MCI's Motion for a Stay Pending Appeal and for Expedited Appeal, BellSouth has announced that it plans to do so on April 17, 2005. As is also set forth in MCI's Motion for a Stay Pending Appeal and for Expedited Appeal and Joint Defendants' Motion for Stay

Pending Appeal and for Expedited Appeal, MCI and Joint Defendants will suffer irreparable injury if BellSouth takes this action. In order for MCI's and Joint Defendants' requests for a stay to accomplish their purpose of preventing this injury, the Court would need to rule upon the motion no later than April 16, 2005.

Therefore, MCI and Joint Defendants respectfully move the Court to order the following schedule:

BellSouth is to file and serve its Response to MCI's Motion for a Stay Pending Appeal and for Expedited Appeal and to Joint Defendants' Motion to Stay Pending Appeal and for Expedited Appeal no later than Monday, April 11, 2005, at 4 pm.

MCI and Joint Defendants are to file their Replies to BellSouth's Response no later than Wednesday, April 13, 2005, at 4 pm.

MCI and Joint Defendants have conferred with BellSouth regarding the above schedule and BellSouth has consented to the same.

CONCLUSION

For the foregoing reasons, this Court should grant the Consent Motion To Set an Expedited Schedule.

Jeffrey A. Rackow
MCI, INC.
1133 19th Street, N.W.
Washington, DC 20036
Tel: (202) 736-6933
fax: (202) 736-6072

Respectfully submitted,

Marc A. Goldman
Jenner & Block LLP
601 Thirteenth St., N.W.
Washington, DC 20005
Tel: (202) 639-6000
(202) 639-6066

Counsel for MCI, INC.

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teresa.roseborough@sablaw.com
dara.steele-belkin@sablaw.com

April 6, 2005

CERTIFICATE OF SERVICE

This is to certify that I have this day served via electronic mail a true and correct copy of the within and foregoing **CONSENT MOTION OF MCIMETRO ACCESS TRANSMISSION SERVICES LLC AND JOINT DEFENDANTS TO SET AN EXPEDITED SCHEDULE** on the following counsel:

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dan.walsh@law.state.ga.us

This 6th day of April, 2005.

Teresa Wynn Roseborough
Georgia Bar No. 614375

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BELLSOUTH TELECOMMUNICATIONS,)
INC.,)

Plaintiff,)

v.)

MCIMETRO ACCESS TRANSMISSION)
SERVICES, LLC, et al.,)

Defendants.)

No. 1:05-CV-0674

DECLARATION OF MARY V. CONQUEST

I, Mary Conquest, InterCompany Program Manager for ITC^DeltaCom Communications, Inc., ("ITC^DeltaCom"), being first duly sworn, do hereby affirm that the following set forth below is true:

1. I have been employed by ITC^DeltaCom for the past five years. Prior to 1999, I was employed by BellSouth. My career in the telecommunications industry began in 1966 with Southern Bell, which later became BellSouth. Over a 30 year period with that company, I held various managerial positions. Following retirement, in 1997 and 1998, I worked as a Consultant to BellSouth as a Project Manager, supporting Operational

Support System (OSS) changes for projects such as Single C Order, Access Reform, Billing Processes, and other projects or products requiring software changes.

2. As a part of my current role as InterCompany Program Manager at ITC^DeltaCom, I support interactions between ILEC's, Independents, and other CLEC's for ITC^DeltaCom. Support functions include: Operational Support Systems ("OSS") for ordering, provisioning and maintenance, performance measures, third party testing, and regulatory mandates.

PURPOSE OF AFFIDAVIT

3. This affidavit highlights ITC^DeltaCom's efforts to obtain information from BellSouth regarding the implementation of the TRRO and the harm ITC^DeltaCom will suffer if BellSouth is permitted to stop processing UNE-P orders. In particular, this affidavit reports on the harm ITC^DeltaCom and its customers will face, including service interruptions and/or degraded service, if BellSouth is allowed to discontinue the UNE-P without complying with its contractual and statutory obligations to enter into the applicable negotiation process. The negotiation processes is the best forum for resolving the myriad of operational issues associated with the loss of the UNE-P and is critical to ITC^DeltaCom's ability to continue to serve its customers.

4. After the February 4, 2005, release of the TRRO, on behalf of ITC^DeltaCom, I began requesting information from BellSouth regarding how we were to do business post March 11, 2005 (the effective date of the TRRO). These requests were posed in the form of telephone calls or e-mails to my assigned BellSouth Contract Manager, Contract Negotiator, Change Control, and/or User Group representatives. I requested a meeting or call with Product Managers in an effort to obtain the facts of the changes, but was refused on February 10, 2005. On February 14, 2005, I was instructed to send my questions to my Contract Negotiator, John Hamman, and was told that BellSouth would provide answers to my inquiries by end of that week. True and correct copies of the questions submitted to Mr. Hamman on behalf of ITC^DeltaCom are attached hereto as Exhibits A & B. To date, many of these questions have not been answered.

5. On February 17, 2005, BellSouth posted its first Change Request Notification, via the Change Control Process ("CCP"), Change Request # 2161. A true and correct copy of that notice is attached hereto as Exhibit C. The purpose of this Change Request is to enable CLECs to make software changes to their Operational Support Systems or with their vendors or manual changes if necessary to remain compliant in processing customer service requests or service orders. BellSouth's response fails to provide any

useful information to the CLECs on this issue. Instead, the Change Request Notification merely references previously issued Carrier Notices, which do not provide the requested and necessary information. True and correct copies of the Carrier Notices referenced in response to Change Request # 2161 are attached hereto as Exhibits D & E.

6. As of today, no information on commingling, i.e., the combining of Unbundled Network Elements (UNEs) with Special Access, has been released by BellSouth, notwithstanding the fact that it was requested on February 23, 2005. Although BellSouth maintains the information is being worked on by teams and will be provided when available, the CLECs like ITC^DeltaCom are held hostage by this omission, or must be forced to bear the expense and experience of resolving matters through their own trial and error. Attached as Exhibit F is a true and correct copy of BellSouth's Change Request Notification for Co-mingling, Change Request # 2116 (request submitted February 28, 2005 and BellSouth "response" posted March 9, 2005). The only response to the request appears to be an indication that "details" are "to be provided," but no details are given, nor have any been given to date, leaving the CLECs with insufficient information to understand the process for ordering commingling.

7. BellSouth has failed to provide any information regarding the implementation of the self-certification process required in Section X, Paragraph 234 of the TRRO. I prepared a Change Request on behalf of all the CLEC's on March 16, 2005. As a result of my request, it became apparent to BellSouth and all of the CLECs that BellSouth had failed to address the need for self-certification, by failing to include an appropriate field in its documentation or system coding specification, which is the process through which ordering instructions are provided.

8. ITC^DeltaCom has followed the posted process found on BellSouth's Performance Measurement and Analysis Platform ("PMAP") website for batch conversions; the batch process is where a grouping of lines are simultaneously moved to the CLEC's facility (switching from UNE-P to UNE-L). The process is severely flawed, and as a result, our customers are experiencing service outages. When our Maintenance Technicians call the appropriate BellSouth maintenance center—the Customer Wholesale Interconnection Network Services ("CWINS") centers—they are told that the BellSouth technician cannot locate our circuits to post the trouble tickets. Only after lengthy escalations and dialogue is the customer's service restored, in some cases days after the problem arose. These outages carry the strong potential for CLECs to lose customers because of outages or

service delays. End Users blame the CLEC for the problem, which was actually caused by BellSouth. In addition, BellSouth has been sending erroneous notices to ITC^DeltaCom indicating that it has performed batch cuts that have not actually be completed or indicating it can support the volume of loops requested for cut, when it is not actually supporting those requests.

9. One of the most requested features for the business customers is “Hunting” or roll over service. Business customers often choose to have many lines to support operations, which typically ring in sequence of availability. Thus, when a call comes in to a grouping of lines, the call “rolls over” to the next line until it finds a vacant line available. BellSouth today refuses to allow a UNE-P service to roll over to a resale service. UNE-P Service is not technologically different from “resale service,” the two differ only according to pricing structure and the agreement pursuant to which BellSouth provides the service to the CLEC. Thus, BellSouth has chosen not to support hunting between classes of service, not because of technical limitations, but rather because of a “business decision.” It remains unclear, despite many questions, if a UNE-P line that is existing (i.e. an embedded customer’s UNE-P line) will be allowed to “hunt” or roll over to other lines within Commercial Agreement Wholesale Platform.

10. To date BellSouth has only posted replies to forty-seven questions posed by various CLECs on these and similar issues. For those questions that have been "answered," the detail is wholly insufficient for CLECs to operate and, as illustrated above, there remain numerous unanswered questions and issues. A true and correct copy of the listing of Question and Answers provided and posted to BellSouth's web site is attached hereto at Exhibit H. Rather than rather than address substantive issues raised by the CLECs and correspondingly provide the information necessary for the CLEC community to resolve issues like the ones described herein, BellSouth has made it a practice to forcefully push for CLECs to enter into Commercial Agreements to supercede existing agreements.

11. I have reviewed the affidavit submitted by Messrs. Graves and Monroe in support of MCImetro Access Transmission Services LLC's opposition to BellSouth's motion for preliminary injunction. The harms described in paragraphs 10-14 of their affidavit will also impact ITC^DeltaCom's customers.

CONCLUSION

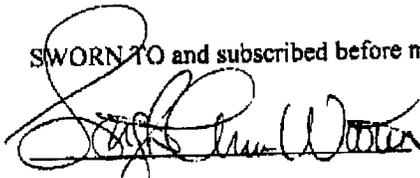
12. BellSouth has refused to provide the information needed to service the customer. The information provided is flawed, incomplete, and inaccurate. BellSouth should be made to follow the statutory and contractual processes

for implementing a change of law and, in particular, to honor the commitments previously made in its Interconnection Agreements with CLECs. ITC^DeltaCom and other CLECs will lose customers and their customers will suffer further service interruptions if BellSouth is permitted to alter the status quo by arbitrarily terminating the availability of the UNE-P without resolving these issues through the negotiation process.

I declare under penalty of perjury that the facts stated herein are true and correct, to the best of my knowledge, information and belief.


Mary Conquest

SWORN TO and subscribed before me this 31st day of March, 2005.


Notary Public

Leigh Ann Wooten

My Commission Expires: 12-14-05

**DECLARATION OF MARY V. CONQUEST
EXHIBIT A**

ITC^DeltaCom/BTI
2-14-05
M. Conquest

TRRO-Unbundling Rules clarifications for doing business under SN91085039:

1-During transition period, if CLEC needs to add an additional line to an existing one line UNE-P account under the transition plan, will BellSouth be able to provide hunting, i.e. one line UNE-P service class and new line resale or UNE-L? Will process describing the ordering process be provided? When?

2-For those UNEP customer's who want to make a change in feature, i.e. add voice mail, delete call waiting, will these orders be business as usual?

3-For UNEP line non-commercial agreement, will a new field be added which will identify account as "embedded" base line? Will this pass to bill presentation?

4-Will BellSouth accept order to move an existing UNEP line during the one- year transition period?

5-In those states allowing FastAccess on UNEP, will CLEC's be allowed to add or delete unregulated services?

6-For EEL orders which are currently plant facility, (PF'd), prior to 3-11-05, be completed as requested?

7-When will the list of impaired areas be made available to the CLEC's?

8-When will the list of clarification codes be made available to the CLEC's and vendors?

9-Will a 'single C' like conversion process be available to the CLEC's to prevent service outages? Directory listing loss? Voice Mail interruptions?

10-Is BellSouth prepared to bill the new order beginning 3-11-05 going forward? If no, when will billing true up begin so that CLECs may do proper accruals?

DECLARATION OF MARY V. CONQUEST
EXHIBIT B

ITC^DeltaCom/BTI
Additional Questions
2-23-05

11- I can find no information on comingling. When will the guide defining our processes be available?

12-We have already encountered issues, when CFA moves from UNE to Special Access, full charges are being applied. How is this cost justified, to simply change the circuit ID, due to some internal inventory system requirement, the facility is not changing. What safeguards are in place to prevent disconnect?

13-On UNE-P User Group call, I ask the frequency of updates to the Wirecenter Listings. I was told that once a wirecenter is listed it is never removed, what is the cite in the order for this action?

14-Will all process changes be managed via Change Control? Manual and electronic?

15-I gave the example of FI storm victims who have temporary housing/facility, how will their UNE-P service be continued if no T order is processed. The address in this example is the same. Moving from temporary building in back of permanent building being repaired.

16-When UNE-P was introduced, over 90 billing flows were provided. When will the new billing flows be made available? How many changes are anticipated?

17-The order refers to self certification, can you elaborate on how BellSouth has interepted this process?

18-The "pipeline" orders, who will manage those and how? If changes to systems are not implemented until 3-13, how will clarifications/rejects etc. be processed on 3-11? In the event of a backlog, what preparation has BellSouth made to address this concern?

19-BellSouth indicated in the UNE-P User Group meeting that the base was frozen by ATN. In the event a customer has a number change, how will BellSouth change its systems to continue the UNE-P service?

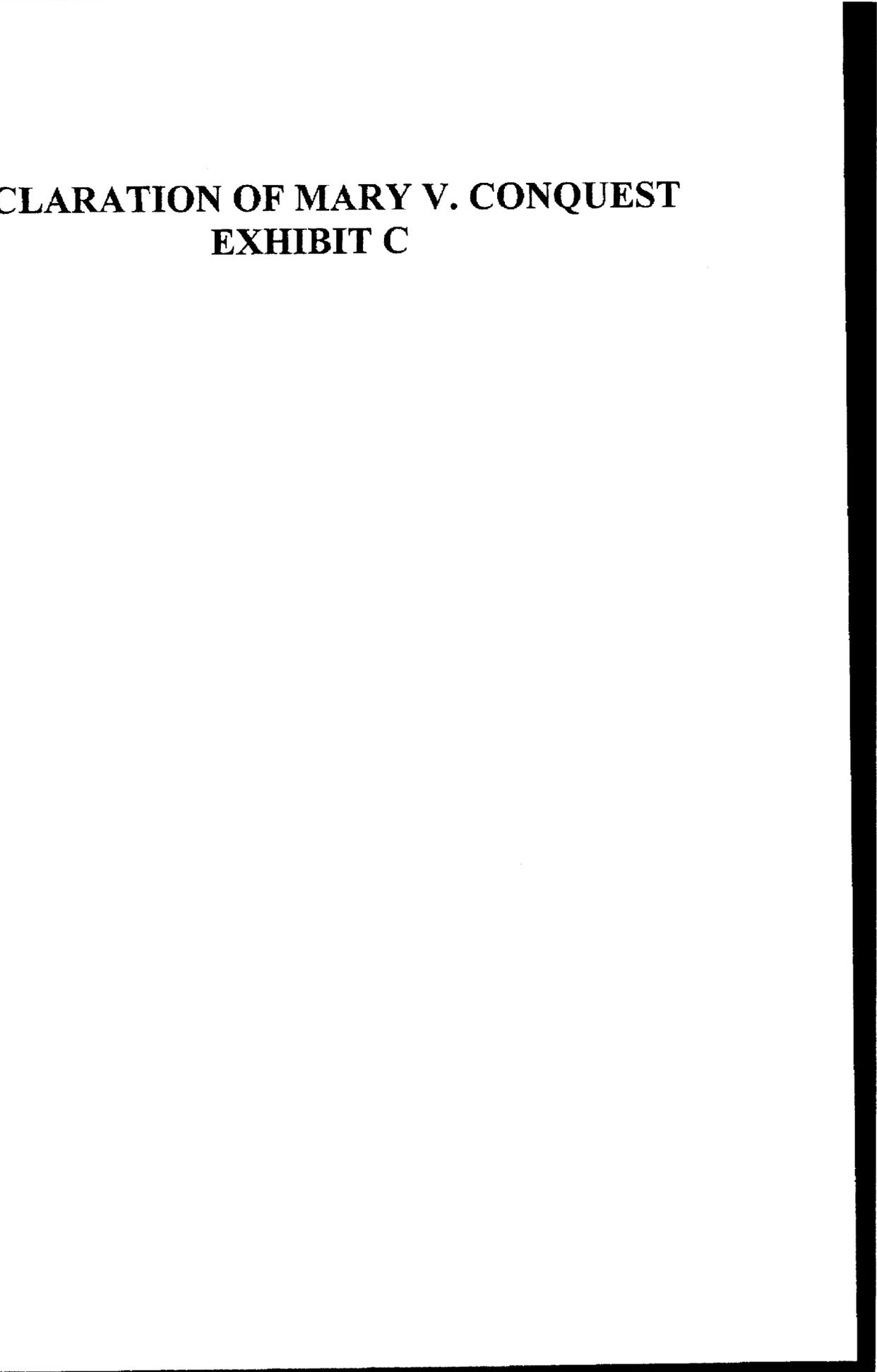
20-If my customer desires to consolidate their accounts or split a current bill/account structure, how will BellSouth process this request?

21-Numerous Guides require updates, can draft copies be provided now? We are 10 business days away from needing to change how we do business. It is not reasonable to assume that CLECs have the size and manpower to work the

many changes, if information is not delivered until 3-8-05. As requested in the CCP meeting, when were the BellSouth vendors provided system/edit changes? How many units of capacity are needed? What was the preliminary sizing and when was it determined?

22-What will be the CAVE date for 18.0.1?

**DECLARATION OF MARY V. CONQUEST
EXHIBIT C**





CHANGE MANAGEMENT

CCP CHANGE REQUEST FORM (RF-1870)

DATE SENT: **02/11/05**

CHANGE REQUEST #: **CR2161**

STATUS: **S**

REQUEST TYPE									
Check appropriate field:									
TYPE 2 (REGULATORY)	<input checked="" type="checkbox"/>	TYPE 3 (INDUSTRY)	<input type="checkbox"/>	TYPE 4 (BST)	<input type="checkbox"/>	TYPE 5 (CLEC)	<input type="checkbox"/>	TYPE 6 (DEFECT)	<input type="checkbox"/>

PRIMARY CLEC CHANGE MANAGEMENT POINT OF CONTACT INFORMATION
(Originator of Request and contact for additional details/questions or to whom response will be made)

NAME:	Change Control	TEL NO.:	205-714-0727
EMAIL:	Change.Control@BellSouth.com	FAX #:	
COMPANY NAME:	BellSouth	OCN	

SECTION TO BE COMPLETED BY INITIATOR OF REQUEST:

TITLE OF REQUEST:	Triennial Review Remand Order (TRRO) – Unbundling Rules – Ordering of new UNE-P lines
-------------------	---

Check appropriate field:

ASSESSMENT OF IMPACT:	HIGH	<input checked="" type="checkbox"/>	MEDIUM	<input type="checkbox"/>	LOW	<input type="checkbox"/>
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PRE-ORDERING	<input type="checkbox"/>	ORDERING	<input checked="" type="checkbox"/>	MAINTENANCE	<input type="checkbox"/>	MANUAL	<input checked="" type="checkbox"/>
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INTERFACES IMPACTED:	LENS	<input checked="" type="checkbox"/>	TAG/XML	<input checked="" type="checkbox"/>	CSOTS	<input type="checkbox"/>	EDI	<input checked="" type="checkbox"/>	EC-TA	<input type="checkbox"/>	TAFI	<input type="checkbox"/>
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TYPE OF CHANGE:

Check appropriate field(s):

SOFTWARE	<input checked="" type="checkbox"/>	PRODUCT & SERVICES	<input type="checkbox"/>	DOCUMENTATION	<input checked="" type="checkbox"/>	HARDWARE	<input type="checkbox"/>
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REGULATORY	<input type="checkbox"/>	INDUSTRY STANDARDS	<input type="checkbox"/>	PROCESS	<input type="checkbox"/>	NEW OR REVISED EDITS	<input type="checkbox"/>
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DEFECT	<input type="checkbox"/>	EXCEPTION FEATURE	<input type="checkbox"/>	OTHER	<input type="checkbox"/>
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Attachment A-1
BellSouth Change Management
Owner: Steve Hancock

Rev: 01/26/04

Ver 4.0

(Jointly Developed by the Change Control Sub-team comprised of BellSouth and CLEC Representatives)

Submit completed form to the BST CCP email box at: change.control@bellsouth.com



CHANGE MANAGEMENT

CCP CHANGE REQUEST FORM (RF-1870)

DETAILED DESCRIPTION OF REQUESTED CHANGE OR DEFECT DESCRIPTION	
In accordance with the Triennial Review Remand Order (TRO), effective March 11, 2005, BellSouth will no longer accept orders requesting new UNE-P without having negotiated a current Commercial Agreement. Please reference Carrier Notification Letter SN91085032, posted February 8, 2005, and Carrier Notification Letter SN91085039, posted February 11, 2005, for specific rules and available options.	
REQ TYP(s) IMPACTED:	M
ACT TYP(s) IMPACTED:	
PON EXAMPLES:	
ERROR MESSAGE:	
ELECTRONIC MAP VERSION AFFECTED BY CHANGE OR DEFECT:	ELMS6, TCIF9

BELLSOUTH USE ONLY:

BELLSOUTH CHANGE REVIEW MEETING RESULTS (Types 2-5 Only):	02/24/05 CR2161 Placed in "S" status to be implemented in Release 18.0.1 on 03/12/05-03/13/05. 03/10/05 - Rescheduled - To be implemented in R18.0.3 on 04/17/05.
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DEFECT VALIDATION RESULTS (Type 6 Only):	
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DEFECT WORKAROUND (Type 6 Only):	
----------------------------------	--

VALIDATED DEFECT SEVERITY LEVEL:	2	3	4
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CLARIFICATION SENT:	
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TARGET IMPLEMENTATION DATE:	R18.0.3 04/17/05
ACTUAL IMPLEMENTATION DATE:	

Attachment A-1
BellSouth Change Management
Owner: Steve Hancock

Rev: 01/26/04

Ver 4.0

(Jointly Developed by the Change Control Sub-team comprised of BellSouth and CLEC Representatives)

Submit completed form to the BST CCP email box at: change.control@bellsouth.com

**DECLARATION OF MARY V. CONQUEST
EXHIBIT D**



BellSouth Interconnection Services

675 West Peachtree Street
Atlanta, Georgia 30375

**Carrier Notification
SN91085032**

Date: February 8, 2005
To: Competitive Local Exchange Carriers (CLEC)
Subject: CLECs – (Interconnection/Contractual and Product/Service) – Commercial Agreement for BellSouth DS0 Wholesale Local Voice Platform Services

On February 4, 2005, the Federal Communications Commission (FCC) released its Order on Remand ("Order"), which among other things, relieved Incumbent Local Exchange Carriers ("ILEC") of their obligation to provide unbundled access to mass market switching and Unbundled Network Element-Platform ("UNE-P") services, on a nationwide basis, pursuant to Section 251 of the Act. The Order establishes a twelve-month transition period commencing March 11, 2005, during which CLECs must transition their embedded base of mass market switching and UNE-P lines to alternative arrangements. The Order further precludes CLECs from adding new UNE-P lines starting March 11, 2005.

As a result of these ordered changes, BellSouth would like to inform CLEC customers that through March 10, 2005, the day before the Order becomes effective, BellSouth will continue to offer its current DS0 Wholesale Local Voice Platform Services Commercial Agreement ("DS0 Agreement") with transitional discounts off of BellSouth's market rate for mass market platform services. Beginning March 11, 2005, the transitional discounts will no longer be available.

BellSouth encourages CLECs to contact their contract negotiator to find out more about its DS0 Agreement while the transitional discounts remain available.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

**DECLARATION OF MARY V. CONQUEST
EXHIBIT E**



BellSouth Interconnection Services

675 West Peachtree Street
Atlanta, Georgia 30375

**Carrier Notification
SN91085039**

Date: February 25, 2005
To: Competitive Local Exchange Carriers (CLEC)
Subject: CLECs – (Product/Service) – **REVISED** - Triennial Review Remand Order (TRRO) -
Unbundling Rules (Originally posted on February 11, 2005)

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former Unbundled Network Elements (“UNE”) that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching¹, as well as certain high capacity loops in specified central offices², and dedicated transport between a number of central offices having certain characteristics,³ as well as dark fiber⁴ and entrance facilities⁵.

The FCC, recognizing that it removed significant unbundling obligations formerly placed on Incumbent Local Exchange Carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.⁶ The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.⁷ The FCC made provisions to include these transition plans in existing Interconnection Agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of “new adds” involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no “new adds” would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, “This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching.”⁸ The FCC also said “This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order.” (footnote omitted)⁹

¹ TRRO, ¶199

² TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)

³ TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),

⁴ TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)

⁵ TRRO, ¶141

⁶ TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)

⁷ TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)

⁸ TRRO, ¶199

⁹ TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating. First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005..."¹⁰ Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis..."¹¹ but made no such finding regarding existing Interconnection Agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing Interconnection Agreements. Therefore, while BellSouth will not breach its Interconnection Agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all Interconnection Agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or Unbundled Network Element-Platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops, **including copper loops capable of providing High-bit Rate Digital Subscriber Line (HDSL) services**, in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005, BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1, HDSL and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (3-6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing Interconnection Agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any

¹⁰ TRRO ¶235

¹¹ TRRO ¶199 Also see ¶¶ 198

orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

DECLARATION OF MARY V. CONQUEST
EXHIBIT F



CHANGE MANAGEMENT

CCP CHANGE REQUEST FORM (RF-1870)

DATE SENT: 02/28/2005

CHANGE REQUEST #: 2116

STATUS: P

REQUEST TYPE

Check appropriate field:

TYPE 2 (REGULATORY)	<input checked="" type="checkbox"/>	TYPE 3 (INDUSTRY)	<input type="checkbox"/>	TYPE 4 (BST)	<input type="checkbox"/>	TYPE 5 (CLEC)	<input type="checkbox"/>	TYPE 6 (DEFECT)	<input type="checkbox"/>
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PRIMARY CLEC CHANGE MANAGEMENT POINT OF CONTACT INFORMATION
(Originator of Request and contact for additional details/questions or to whom response will be made)

NAME:	Tina Berard/Velma Stephens/Change Control	TEL NO:	205-714-0727
EMAIL:	change.control@bellsouth.com	FAX #:	
COMPANY NAME:	BellSouth	OCN:	

SECTION TO BE COMPLETED BY INITIATOR OF REQUEST:

TITLE OF REQUEST: Commingling Rules

Check appropriate field:

ASSESSMENT OF IMPACT:	HIGH	<input checked="" type="checkbox"/>	MEDIUM	<input type="checkbox"/>	LOW	<input type="checkbox"/>
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PRE-ORDERING	<input type="checkbox"/>	ORDERING	<input checked="" type="checkbox"/>	MAINTENANCE	<input type="checkbox"/>	MANUAL	<input checked="" type="checkbox"/>
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INTERFACES IMPACTED:	LENS	<input type="checkbox"/>	TAG / XML	<input type="checkbox"/>	CSOTS	<input type="checkbox"/>	EDI	<input type="checkbox"/>	EC-TA	<input type="checkbox"/>	TAFI	<input type="checkbox"/>
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TYPE OF CHANGE:

Check appropriate field(s):

SOFTWARE	<input type="checkbox"/>	PRODUCT & SERVICES	<input checked="" type="checkbox"/>	DOCUMENTATION	<input checked="" type="checkbox"/>	HARDWARE	<input type="checkbox"/>
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REGULATORY	<input checked="" type="checkbox"/>	INDUSTRY STANDARDS	<input type="checkbox"/>	PROCESS	<input type="checkbox"/>	NEW OR REVISED EDITS	<input type="checkbox"/>
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DEFECT	<input type="checkbox"/>	EXCEPTION FEATURE	<input type="checkbox"/>	OTHER	<input type="checkbox"/>
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Attachment A-1
BellSouth Change Management

Rev: 01/26/04
Ver 4.0

(Jointly Developed by the Change Control Sub-team comprised of BellSouth and CLEC Representatives)

Submit completed form to the BST CCP email box at: change.control@bellsouth.com



CHANGE MANAGEMENT

CCP CHANGE REQUEST FORM (RF-1870)

DETAILED DESCRIPTION OF REQUESTED CHANGE OR DEFECT DESCRIPTION	
To provide details surrounding Commingling as ordered by the FCC in the TRO (Triennial Review Order). Details to include impacts for ordering and documentation	
REQ TYP(s) IMPACTED:	A, B
ACT. TYP(s) IMPACTED:	D, N, C, T
PON EXAMPLES:	
ERROR MESSAGE:	
ELECTRONIC MAP VERSION AFFECTED BY CHANGE OR DEFECT:	All

BELLSOUTH USE ONLY:

BELLSOUTH CHANGE REVIEW MEETING RESULTS (Types 2-5 Only):	
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DEFECT VALIDATION RESULTS (Type 6 Only):	
--	--

DEFECT WORKAROUND (Type 6 Only):	
----------------------------------	--

VALIDATED DEFECT SEVERITY LEVEL:	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/>
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CLARIFICATION SENT:	
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TARGET IMPLEMENTATION DATE:	
ACTUAL IMPLEMENTATION DATE:	

**DECLARATION OF MARY V. CONQUEST
EXHIBIT G**

The Information contained herein is provided as information only. It does not represent a binding obligation between Bellsouth and any other entity, and is subject to change.

GENERAL

Q1. When was the FCC's Order on Remand (TRRO or "Order") released?

A1. February 4, 2005

Q2. When is the Order scheduled to become effective?

A2. March 11, 2005

SWITCHING

Q3. Will BellSouth continue to offer unbundled switching (UNE-P) after March 11, 2005?

A3. Please refer to Carrier Notification SN91085061 posted on 3/07/05.

Q4. If a customer does not have an effective commercial agreement how will its in-service units (embedded base) of UNE-P customers be affected?

A4. Consistent with the Order, BellSouth will begin charging CLECs \$1.00 more for each UNE-P line serving its embedded base of customers following the completion of the change of law process, and per the TRRO, the rate increase will be retroactive to March 11, 2005. BellSouth will continue to charge this higher rate until the earlier of (1) March 10, 2006, or (2) the date the CLEC transitions its customers to alternative arrangements. The embedded base of UNE-P must be transitioned to alternative arrangements no later than March 10, 2006.

Q5. Will BellSouth change its current commercial agreement offer after the TRRO becomes effective?

A5. Yes. Please refer to BellSouth's Carrier Notification SN1085032 http://interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91085032.pdf, which was posted on 2/8/05. Through March 10, 2005, BellSouth will continue to offer its current DS0 Wholesale Local Voice Platform Services Commercial Agreement ("DS0 Agreement") with transitional discounts off of BellSouth's current market rate for mass market platform services effective January 1, 2005. As of March 11, 2005,

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BellSouth will continue to offer commercial agreements for DS0 switching and platform services, but the pricing set forth in the current DS0 Agreement will no longer be available.

RATES

Q6. Based on the TRRO, what are BellSouth's plans to apply the UNE rate increases to be implemented?

A6. BellSouth will invoke the change of law provisions in existing interconnection agreements to incorporate the rate increases for the embedded base of DS0 switching, high capacity loops, dark fiber loops, dedicated transport and dark fiber transport. Upon incorporation, such rates will be retroactive to March 11, 2005, per the TRRO. The rate increases will occur as detailed in A7 below.

Q7. What are the rates that will be applied to the embedded base?

A7. Dedicated Transport – the higher of 115% of the rate the CLEC paid for this element on 6/15/04 or 115% of the rate the state commission establishes for this element between 6/16/04 and 3/11/05.

High Capacity Loops – the higher of 115% of the rate the CLEC paid for this element on 6/15/04 or 115% of the rate the state commission establishes for this element between 6/16/04 and 3/11/05.

DS0 Switching – the higher of rate at which the CLEC leased the UNE-P arrangement on 6/15/04 plus \$1.00 or the rate the state commission establishes for this element between 6/16/04 and 3/11/05 plus \$1.00.

LOOP /TRANSPORT

Q8. Will CLECs be permitted to purchase new UNE DS1 loops and UNE DS1 transport pursuant to rates, terms and conditions in their interconnection agreement after the effective date of the order? How will the embedded base be affected?

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- A8. Please refer to BellSouth's Carrier Notification SN91085061 http://interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91085061.pdf, which was posted on 3/07/05 and BellSouth's Carrier Notification SN91085039 http://interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91085039.pdf, which was posted on 2/11/05.
- Q9. **Will CLECs be permitted to purchase new UNE DS3 loops and UNE DS3 transport pursuant to rates, terms and conditions in their interconnection agreement after the effective date of the order? How will the embedded base be affected?**
- A9. Please refer to BellSouth's Carrier Notification SN91085061 http://interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91085061.pdf, which was posted on 3/07/05 and BellSouth's Carrier Notification SN91085039 http://interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91085039.pdf, which was posted on 2/11/05.
- Q10. **Will CLECs be permitted to order dark fiber loops and transport pursuant to rates, terms and conditions in their interconnection agreement after the effective date of the order? How will the embedded base be affected?**
- A10. Please refer to BellSouth's Carrier Notification SN91085061 http://interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91085061.pdf, which was posted on 3/07/05 and BellSouth's Carrier Notification SN91085039 http://interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91085039.pdf, which was posted on 2/11/05.

INTERCONNECTION AGREEMENTS vs. COMMERCIAL AGREEMENTS

- Q11. **Are new CLECs required to have an Interconnection Agreement (IA) even if they sign a Commercial Agreement (CA)?**
- A11. It depends on the CLEC's business plan. The Commercial Agreement addresses BellSouth's local switching and platform services. If the CLEC's business plan only requires services offered through local

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switching or platform services, an interconnection agreement may not be necessary. However, if the CLEC wishes access to other local services pursuant to Section 251 of the Act, e.g. unbundled network elements or interconnection with BellSouth's network, an interconnection agreement is necessary. A CLEC should carefully review the services that are offered pursuant to these agreements to determine what contracts it needs to have in place in order to fulfill its business plans.

Q12. Will the Short Term (6 month) Commercial Agreement Pricing be the same as the Long Term Commercial Agreement?

A12. No. As BellSouth stated in Carrier Notification SN91085032 posted on 2/11/05, BellSouth's long term commercial agreement currently offers transitional discounts off of BellSouth's market rate for mass-market platform services. The short-term commercial agreement does not include these transitional discounts, therefore, the full market rate will apply. BellSouth's current market rate for mass-market platform services is \$7 over the state ordered TELRIC recurring rate. The current market rate for enterprise platform services is \$10 over the state ordered TELRIC recurring rate.

IMPLEMENTATION

Q13. For existing UNE-P lines under the interconnection agreement, will a new field be added which will identify the account as an "embedded" base line?

A13. A new field is not currently part of the implementation plans. However, the service establishment date on the customer service record may be used to identify those circuits classified as part of the "embedded base".

Q14. After March 11, 2005, how will a UNE-P embedded base customer add an additional line?

A14. Pursuant to BellSouth stated in Carrier Notification SN91085061 posted on 3/07/05, BellSouth will continue to accept CLEC orders for these "new adds" until the earlier of (1) an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders; or (2) April 17, 2005. CLECs have three options for ordering additional lines after April 17, 2005: 1) order the new line as resale pursuant to its interconnection agreement; 2) execute a short term commercial agreement with BellSouth and order the new line pursuant to the rates, terms and conditions in that commercial agreement; or 3) execute

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BellSouth's long term commercial agreement and order the new line pursuant to the rates, terms and conditions in that agreement.

Q15. How will BellSouth treat an existing UNE-P customer concerning the following:

A15. For purposes of responding to the questions below, an "existing UNE-P customer" is the embedded base of UNE-P lines as of 3/10/05.

a) Change Features

a) This would be considered a change order, which will be accepted during the transition period.

b) Add Features

b) This would be considered a change order, which will be accepted during the transition period.

c) Add Lines

c) This will be considered a new line. See Response to Q14.

d) Moves

d) This will be considered a new line. See response to Q14.

e) DSL/Line Splitting

e) Adding/removing DSL/Line Splitting to the embedded base is considered a change order, which will be accepted on the embedded base during the transition period pursuant to existing rates, terms and conditions for such services, if any, in CLEC's interconnection agreement.

f) Suspend and Restore

f) A "suspend and restore" would be considered a change order, which will be accepted during the transition period.

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Q16. Will a UNE-P CLEC with a commercial agreement continue to be billed for the affected customer under the transition rules rather than under the commercial agreement?

A16. BellSouth offers a short-term commercial agreement that will permit the CLEC to order new UNE-P lines at a full market rate while maintaining the embedded base, under the interconnection agreement. Under this option, the embedded base would be subject to the transition rules of the TRRO. If the CLEC signs a long term commercial agreement by March 10, 2005, and avails itself of the transitional discounts that BellSouth is offering, the commercial agreement would apply to all UNE-P lines, including the embedded base.

Q17. Is there a target date by which CLECs should have orders submitted to transition the embedded base to an alternative arrangement?

A17. Per the TRRO, CLECs should submit transition orders within a timeframe to enable the transition to occur within the 12 month transition window.

Q18. Can BellSouth clarify the last sentence of the third paragraph of the Carrier Notification Letter SN91085039 posted on 2/11/05? It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

A18. BellSouth will implement the price increases ordered by the FCC in the TRRO with respect to the CLEC's embedded base of dedicated transport, high capacity loops, dark fiber transport and loops and DS0 switching, regardless of the date the CLEC amends its interconnection agreement. Consistent with the Order, these rates will be applied retroactively and trued up back to 3/11/05.

Q19. When will the list of impaired areas be made available to the CLECs?

A19. BellSouth made a public filing with the FCC on Friday, February 18. BellSouth also posted a carrier notification on February 18, 2005, identifying wire centers where there is no impairment.

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Q20. How did BST determine which Central Offices were to be classified as non-impaired?

A20. BellSouth applied the FCC's definitions as set forth in 47 C.F.R. § 51.5 and the criteria set forth in 47 C.F.R. § 51.319 of the revised rules adopted in the FCC's TRRO.

CCP

Q21. When will documentation be provided for the OSS changes being implemented?

A21. The User Requirements will be provided as soon as possible, although BellSouth expects few changes to the systems other than internal changes related to BellSouth's processing of local service requests.

Q22. Why did BellSouth open a Type 2 Change Request (Regulatory Mandate) as opposed to a Type 4 change Request (BellSouth initiated)?

A22. The Triennial Review Remand Order ("TRRO"), which sets forth the FCC's final unbundling rules, clearly constitutes a regulatory mandate.

Q23. If a DataLEC with an LOA submits a line splitting LSR on an embedded UNE-P account, will this LSR be accepted after March 11, 2005? If yes, what changes will be implemented via OSS or in the LCSC to make sure that this LSR will not be rejected by the system or by BellSouth LCSC personnel?

A23. 1) Yes, an LSR for line splitting on an embedded base UNE-P account will be accepted. 2) No OSS changes are necessary.

Q24. How will other systems and processes be affected that were implemented in support of UNE-P. For example, line loss notifications?

A24. An evaluation is underway regarding the systems and processes impacted.

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Q25. What is the cite in the TRRO for BellSouth's position that once a wire center has been listed as one where no impairment exists for a particular element, that element may never again be ordered as a UNE in that wire center?

A25. 47 C.F.R. § 51.319(e)(3)(i) and 47 C.F.R. § 51.319(e)(3)(ii)

Q26. Where a hurricane victim, for example, is currently served via UNE-P but is located in a temporary housing facility at the same address as the housing being repaired, will the move from the temporary to the permanent housing be considered a new order that will not be permitted after March 10, 2005?

A26. No. This end user line would be considered part of the embedded base, as the move from the permanent housing to temporary housing and back again is considered a maintenance request rather than new service.

Q27. If an end user desires to consolidate multiple accounts or split a current bill/account structure, will BellSouth process this request after March 10, 2005?

A27. Yes. This is a change to the embedded base that is permitted during the transition period.

Q28. Numerous Guides require updates. Can draft copies be provided now?

A28. BellSouth will provide any changes to existing documentation as soon as it becomes available.

Q29. On the 2/23/05 CCP call, we thought we were told that the rules pursuant to which UNE-P will be withdrawn are based on each carrier's Interconnection Agreement. Please explain this statement.

A29. Please refer to BellSouth Carrier Notifications SN91085039, posted on 2/11/05, and SN91085061, posted on 3/7/05.

Q30. By what date will BellSouth have its staff trained to handle the rejection of "new adds"?

A30. BellSouth internal personnel are expected to be trained prior to implementation of TRRO.

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Q31. When will documentation regarding the OSS changes BellSouth plans to implement on 4/17/05 be provided to the CLEC community?

A31. User Requirements were delivered to the CLECs on March 8, 2005, and a review was conducted that same day. An in-depth review of the User Requirements was also conducted with the CLECs on March 16, 2005.

Q32. What is BellSouth's rationale for implementing its "no new adds" policy without following change management procedures?

A32. The FCC issued the TRRO on 2/4/05 with a self-effectuating provision prohibiting "new adds" effective 3/11/05. BellSouth initiated a Type 2 Regulatory Change Request in an attempt to comply with the 3/11/05 date. This compressed timeframe did not permit the CCP process to be followed in the normal course of business. However, this is no longer an issue given that BellSouth has extended the implementation date to April 17, 2005, allowing the normal CCP process to be followed.

Q33. Cite where the TRRO states that implementation of final rules are mandated for implementation on March 11, 2005?

A33. This is not an operational issue to be addressed in CCP. Please refer to Carrier Notification SN91085039, which was posted February 11 2005.

Q34. Why aren't all regulatory changes that are opened in CCP implemented within the same timeframe that BellSouth is implementing the "no new adds" change from the TRRO? What makes them different?

A34. A main component for the implementation of changes associated with a Type 2 Regulatory Change Request is the effective date of the Federal or State order that requires the change. BellSouth makes every attempt to implement all Type 2 change requests by the effective date of such orders or as close to the effective date as possible.

Q35. Why doesn't BellSouth follow the Change Control Process ("CCP") in implementing the "no new adds" change from the TRRO? Other FCC orders with effective dates went through a collaborative process to develop a product or service, why is this different since the same areas of implementation are affected and changes will need to be implemented?

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A35. See response to Questions 32 and 34.

Q36. When will BellSouth start to provide CLECs with a daily status of any implementation activities that may be necessary to support the systems and operational changes being implementing to reject "new adds"? When will documentation changes be made to support the new processes?

A36. BellSouth is providing user requirements, and other appropriate information through the CCP communication process as it becomes available, as well as Carrier Notification letters posted to the interconnection web site. Please also refer to BellSouth's Response to Question 31.

Q37. Will all process changes, including manual and electronic changes, be managed via Change Control?

A37. BellSouth will follow the CCP process, where appropriate. Please also refer to BellSouth's Response to Question 32.

Q38. During the UNE-P User Group meeting, BellSouth indicated that the embedded base was frozen by Active Telephone Number [ATN]. In the event a customer has a number change, how will BellSouth change its systems to continue the UNE-P service?

A38. No BellSouth systems change is required. A number change is considered change activity, which BellSouth will continue to support.

Q39. What will be the CAVE date for Release 18.0.31?

A39. The Cave load date is April 29, 2005 for all 18.0.3 Post Production and Defect Correction releases.

Q40. At what point during the Release weekend (April 16 and 17) will an LSR be considered in the pipeline.

A40. The maintenance window for Release 18.0.3 begins at 10:00 p.m. ET on Saturday, April 16, 2005. An error-free ("clean") LSR is considered in the pipeline if it is received by BellSouth and a FOC is generated before the maintenance window begins. LCSC business hours for specific service types will be conducted according to hours of operation posted on the BellSouth ICS web site.

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Q41. If an LSR in the pipeline is subsequently supplemented ("supp'd"), will BellSouth process that "supp"?

A41. Yes. BellSouth will process supp orders associated with these pipeline orders. This response supercedes previously communicated procedures regarding this issue.

Q42. If a clean LSR in the pipeline is subsequently placed in pending facility status ("PF'd"), will BellSouth ultimately work that order?

A42. Yes. If a clean LSR in the pipeline is subsequently held due to lack of facilities, that order will be worked when facilities become available. BellSouth had originally stated that it did not intend to complete PF'd orders after implementation of the "no new adds" requirement, but due to systems capabilities, BellSouth has reevaluated its position and will be completing those orders as stated above.

Q43. Will an LSR that is clarified due to a BellSouth error be pulled from clarification and worked?

A43. Yes. A clean LSR in the pipeline that is clarified in error by BellSouth will be pulled and worked.

Q44. Will the escalation process for LSR issues be the same under BellSouth's commercial agreement as they are under BellSouth's interconnection agreement?

A44. Yes. Please contact your negotiator for specific questions about BellSouth's commercial agreement.

Q45. Once BellSouth implements the TRRO with respect to rejecting "new adds", will hunting be allowed across classes of service? (UNE-P to Resale, Resale to WholesalePlatform?)

A45. BellSouth does not support hunting across classes of service.

Q46. Under the Commercial Agreement, will UNE-P and Wholesale Platform hunting be allowed?

A46. See BellSouth's Response to Question 45.

Q47. Does the TRRO affect UNE-BRI/PRI (REQ M ISDNS)?

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- A47. UNE-P BRI (DS0 ISDN) is affected by the TRRO and will be subject to the FCC's "no new adds" ruling.

UNE-P PRI (DS1 ISDN) was not impacted by the TRRO, but the FCC relieved ILECs of their obligation to provide unbundled access to DS1 level switching in the Triennial Review Order ("TRO"). UNE-P PRI is being removed from CLEC interconnection agreements through the change of law process. Bellsouth is making UNE-P PRI available through its short term commercial agreement.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BellSouth Telecommunications,)
Inc., Plaintiff,)
-vs-)
MCI Metro Access Transmission)
Services, LLC, et al.,)
Defendants.)

Docket No. 1:05-CV-674-CC

Transcript of the Plaintiff's Emergency Motion for Preliminary
Injunction Proceedings
Before the Honorable Clarence Cooper
April 1, 2005
Atlanta, Georgia

Amanda Lohnaas, RMR, CRR
Official Court Reporter
United States District Court
Atlanta, Georgia

Amanda Lohnaas, Official Court Reporter

10 and I would like to come back to that.

11 There's a point about consistency that was made here.
12 They put up charts. There were all kinds of questions about
13 what BellSouth has done in the past.

14 I need Your Honor's -- answer to that is
15 fundamentally the right one, that is before you had an FCC
16 order, Mr. Goldman said there have been other FCC orders and he
17 quoted three of them, important distinction, Your Honor, each
18 of those orders imposed a new requirement, BellSouth had to do
19 something it didn't have to do before.

20 So when you have to do something new, when you have
21 to provision a new facility, yeah, you have to have a way of
22 doing that, you have to decide how am I going to do this, how
23 am I going to allow this commingling thing Mr. Goldman referred
24 to. When you set up a new requirement it makes sense you have
25 to have an obligation.

Amanda Lohnaas, Official Court Reporter

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1 But when you rescind a requirement, simply don't have
2 to do anything anymore, that doesn't require any negotiation.
3 There are no new rates to be negotiated. There is nothing
4 complicated to be done here, Your Honor.

5 Ms. Roseborough's 900-page agreement will remain
6 exactly as it is. There is no need for complicated systems
7 work. All they have to do is stop placing the orders. That's
8 all that has to happen, Your Honor.

9 And then as to replacements, as Your Honor has said,
10 since August 2004 they've known that it was time to come up
11 with a replacement. If they haven't come up with a replacement

BellSouth Interconnection Services

675 West Peachtree Street
Atlanta, Georgia 30375

**Carrier Notification
SN91085073**

Date: March 24, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Triennial Review Remand Order (TRRO) – Unbundling Rules - Wire Centers that Satisfy Non-impairment Thresholds

On February 18, 2005, at the request of the Federal Communications Commissions ("Commission"), BellSouth filed with the Commission, a list by Common Language Location Identification ("CLLI") codes of those wire centers that satisfied the non-impairment thresholds for high-capacity loops, transport and dark fiber as adopted by the Commission in its *Triennial Review Remand Order* ("TRRO").¹ Additionally, in Carrier Notification letters: SN91085045, posted on February 18, 2005, SN91085059 and SN91085065, posted on March 11, 2005, BellSouth provided similar information and supporting data as well as responded to numerous questions from CLECs about the methodology BellSouth used to identify these wire centers.

This is to advise that BellSouth recently discovered an error in the mathematical formula that was used to count retail digital access lines on a per 64 kbps-equivalent basis, as required by the Commission's rules. This error impacted only retail business line counts and did not affect the quantity of Unbundled Network Element (UNE) loops, the quantity of which were correctly stated on a per 64 kbps-equivalent basis. However, as a result of this error, retail business lines were overstated, and thus, the wire centers meeting the Commission's non-impairment thresholds were not correctly identified in either BellSouth's February 18, 2005 filing or its Carrier Notification letters: SN91085045, SN91085059 and SN91085065.

BellSouth understands the necessity of correctly implementing the Commission's non-impairment thresholds and recognizes that it is only entitled to unbundling relief in or between those wire centers where the Commission has determined CLECs are not impaired without unbundled access to high-capacity loops, transport and dark fiber. Because of the importance of the Commission's unbundling determinations and because both the Commission and the industry must know with certainty where those wire centers are located, BellSouth has retained an independent third-party to review the methodology BellSouth utilized in implementing the non-impairment thresholds set forth in the TRRO and to identify the specific wire centers where those thresholds have been met. Once this independent third-party review is complete, BellSouth will provide the Commission and the industry with the results.

This independent third-party review should not delay implementation of the TRRO in BellSouth's region. Before the Commission's unbundling rules took effect on March 11, 2005, state commissions in

¹ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand (Feb. 4, 2005) ("*Triennial Review Remand Order*").

Alabama, Georgia and Kentucky had ordered BellSouth to continue accepting new orders for unbundled switching and high-capacity facilities until BellSouth's Interconnection Agreements have been amended. In order to allow its other state commissions to act, BellSouth advised CLECs and state regulators that it would not reject orders for unbundled switching and high-capacity loops, transport and dark fiber until the earlier of: (1) issuance of an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders; or (2) April 17, 2005. This independent, third-party review will be completed and the results disseminated before BellSouth rejects, or challenges through dispute resolution, any orders for new unbundled high-capacity loops, transport and dark fiber pursuant to the TRRO.

BellSouth sincerely regrets this error and apologizes for any inconvenience that it has caused. Please contact your BellSouth contract negotiator with any questions.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

CASE NO. 05-_____ -

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

BELLSOUTH TELECOMMUNICATIONS, INC.,

Plaintiff-Appellee,

v.

MCIMETRO ACCESS TRANSMISSION SERVICES LLC, et al.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Northern District of Georgia

JOINT DEFENDANTS' MOTION TO STAY
THE PRELIMINARY INJUNCTION PENDING APPEAL AND FOR AN
EXPEDITED APPEAL

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STATUTES

47 U.S.C. § 251(d)6
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Pursuant to Fed. R. App. P. 8(a)(2), Appellants ITC^DeltaCom Communications, Inc., Business Telecom, Inc., Cbeyond Communications, LLC, LecStar Telecom, Inc., Talk America, Inc., US Carrier Telecom, Dieca Communications, Inc. d/b/a Covad Communications Corp., Southern Digital Network, Inc. d/b/a FDN Communications, BroadRiver Communication Corporation, NuVox Communications, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Atlanta, LLC, KMC Telecom Holdings, Inc., KMC Telecom V, Inc., and KMC Telecom III, LLC (“Joint Defendants”) move this Court to stay the District Court’s April 5, 2005, preliminary injunction order pending appellate review and to grant an expedited appeal. Joint Defendants moved the District Court to stay its grant of the preliminary injunction, and such motion was denied by the District Court.

REQUEST FOR STAY AND EXPEDITED APPEAL

Immediate action by this Court is necessary to relieve Joint Defendants from a preliminary injunction that serves to alter the status quo and impose irreparable harm upon Joint Defendants and the public. The U.S. District Court for the Northern District of Georgia issued a preliminary injunction enjoining the enforcement of prior order of the Georgia Public Service Commission. (Exhibit 1, Order.) The District Court’s injunction effectively allows BellSouth to violate the express terms of its contracts with Defendants and to cut off the provision of

certain services to Defendants at will, which BellSouth has indicated it will do as to any Defendants who have not entered into a “commercial agreement” with BellSouth as of April 8, 2005.

Relying on nothing stronger than negative inference, the District Court held that an order of the Federal Communications Commission (“FCC”) had abrogated a negotiated provision of the parties interconnection agreements dictating how changes in law were to be incorporated into the agreements. In doing so, the District Court also refused to give any meaning to provisions of the FCC’s Order expressly reminding the parties that they remained free to negotiate for services not no longer required under the Order and directing that the parties follow the negotiation procedures set out in Section 252 of the Telecommunications Act to give effect to the new unbundling rules announced in the Order. As the District Court acknowledged, Joint Defendants will undoubtedly suffer irreparable harm as a result of his grant of a preliminary injunction. The District Court erred, however, by failing to weigh this undoubted harm against that claimed by BellSouth. Instead, the District Court made inferences as to what the FCC must have intended, confusing the undisputed fact that the FCC Order changed applicable law with the parties obligations to comply with the freely negotiated terms of their contracts. The Georgia Public Service Commission (“GPSC”) ordered BellSouth to comply with its contractual agreements with Defendants. By enjoining enforcement of that

order, the District Court has effectively granted affirmative injunctive relief that alters the status quo that has existed between the parties for several years. Moreover, the only way Defendants can avoid the loss of service threatened by BellSouth is to sign new contracts with BellSouth by April 8th. If they do so, however, they risk being found to have extinguished their right to insist on BellSouth's compliance with their existing contracts.

The District Court's grant of an extraordinary mandatory injunction was contrary to law and threatens Defendants with irreparable harm. The Order should be stayed immediately pending this Court's expedited review of the Preliminary Injunction Order.

MEMORANDUM OF LAW

Joint Defendants are telecommunications service providers that have negotiated contractual agreements ("Interconnection Agreements") with BellSouth Telecommunications, Inc. ("BellSouth"). These contracts specify the terms and conditions under which Joint Defendants may lease or otherwise access various elements of BellSouth's network, including the methodology for provisioning and terminating such service and the rates charged for such access. While some of the terms of the agreements are mandated by statutes, regulatory determinations, arbitration decisions, or judicial determinations, many result solely from the voluntary negotiation of the parties. Among the voluntarily negotiated provisions

of the agreements between Defendants and BellSouth are “change of law” provisions that specifically contemplate that the FCC will effect changes to the existing legal regime during the life of the agreement. The change of law provisions provide that if the regulatory, statutory or judicial regime changes in a material way, the parties will adhere to a particular procedure for amending their agreements to implement those changes in the law.

The FCC caused precisely the type of change in the law anticipated by the parties when it issued the *Triennial Review Remand Order* (“TRRO”) (Exhibit 2, TRRO) and changed the listing unbundled network elements BellSouth is required to provide to Defendants. In an about-face, however, from its past insistence on strict compliance with the change of law provisions, BellSouth contended before the Georgia Public Service Commission (“GPSC”) that the changes of law in the TRRO had to be implemented immediately, rather than pursuant to the “change of law” process or the negotiation process contemplated by Paragraph 233 of the TRRO.¹ To give effect to Paragraph 233 and to maintain the status quo long enough to allow the orderly amendment of the interconnection agreements, the GPSC enjoined BellSouth from refusing to comply with its contracts and directed

¹ BellSouth apparently believes that the choice of law provisions apply only when they work in its favor – they apply when BellSouth is required to change its business model to comply with new rulings but not when competitors such as Defendants are required to make changes. (Exhibit 15, Transcript pp.135:11-25 at.)

the parties to act expeditiously to negotiate the necessary changes to their agreements. The District Court has erroneously granted a preliminary injunction barring enforcement of the GPSC order and BellSouth has informed Joint Defendants that any carrier that has not entered into a “commercial agreement” proposed by BellSouth by April 8, 2005 will no longer be able to place new orders for certain services, and that it will begin rejecting such orders on April 17, 2005. (Exhibit 3, 3/21/05 Carrier Notification.)

The District Court’s order wrongfully, and potentially forever, allows BellSouth to avoid the freely negotiated terms of its contracts. BellSouth insists that the FCC’s ruling abrogated the “change of law provisions” in contracts between the parties, but neither it nor the District Court identifies any legitimate basis in the law for the FCC to abrogate the parties’ contractual change of law provisions, and further fails to identify any language in the FCC’s ruling even suggesting, let alone mandating, abrogation of the change of law provisions. Moreover, no harm BellSouth faces can outweigh the permanent harm that will be caused Defendants by the District Court’s Preliminary Injunction Order. The District Court’s order should be stayed by this Court.

I. FACTUAL BACKGROUND

A. The FCC’s Triennial Review and Remand Order and Unbundled Network Elements

The Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* (“1996 Act”)

or “Act”) requires BellSouth to allow Competitive Local Exchange Carriers (“CLECs” such as Joint Defendants here) to purchase unbundled, *i.e.*, distinct, elements of BellSouth’s network and provides parameters for determining the rates that CLECs must pay to BellSouth for unbundled network elements (“UNEs”). 47 U.S.C. § 252(d)(1)(A) - (B). The FCC is responsible for making rules to determine which UNEs BellSouth and other incumbent LECs must provide to the CLECs. *Id.* § 251(d)(2). In August 2003, the FCC released the *Triennial Review Order*,² which addressed previous court decisions striking down portions of the FCC’s UNE rules. Various telecommunications carriers appealed the *Triennial Review Order* and, on March 2, 2004, the D.C. Circuit remanded in part and vacated in part portions of that order, in particular, directing the FCC to reconsider certain of its unbundling rules. *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

On February 4, 2005, the FCC released its *Triennial Review Remand Order* (“*TRRO*”).³ In the *TRRO*, the FCC further revised its unbundling rules, making substantial changes to the previously existing competitive regime. Specifically, the

² *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (CC Docket Nos. 01-338, 96-98, and 98-147), FCC 03-36 (released August 21, 2003), 68 Fed. Reg. 52276 (Sept. 2, 2003) (“*Triennial Review Order*”).

³ *In re Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (WC Docket No. 04-313 and CC Docket No. 01-338), FCC 04-290 (released Feb. 4, 2005) (“*Triennial Review Remand Order*”).

TRRO provides that the FCC no longer reads § 251(c)(3) of the Act to require incumbent LECs to provide mass market local circuit switching as a UNE.⁴ (*TRRO* ¶¶ 5, 226.) It also held that whether BellSouth had to provide transport lines and high-capacity loops as UNEs would depend on the size of the wire center involved. (*Id.*)

To implement these substantial changes, the *TRRO* provides for a twelve to eighteen-month period from the effective date of the *TRRO* during which the CLECS must be allowed to “retain access to” these former UNE elements, and to a combination of these elements known as the UNE platform, or “UNE-P” (the combination of an unbundled loop, unbundled local circuit switching, and shared transport) as to existing customers (“embedded customers”). Per the *TRRO*, this transition period began on March 11, 2005. (*TRRO* ¶¶ 5, 227.)

The *TRRO* also addresses how the parties are to implement the new unbundling rules for customers not covered by the transition plan. In the *TRRO* section entitled “Implementation of Unbundling Determinations,” the Commission ordered as follows:

⁴ The *TRRO*’s analysis is limited to § 251 of the Act and does not address whether § 271 of the Act or provisions of state law require BellSouth to continue providing some or all of those elements on an unbundled basis (perhaps at different rates).

B. Implementation of Unbundling Determinations

233. We expect that incumbent LECs [such as BellSouth] and competing carriers will implement the Commission's findings as directed by section 252 of the Act. *Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.* We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. *Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.* We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order.

(TRRO ¶ 233 (footnotes omitted and emphasis added).)

In addition, Joint Defendants' Interconnection Agreements with BellSouth specify how changes of law, like those imposed by the TRRO, are to be implemented. For example, Defendant ITC^DeltaCom Communications, Inc.'s ("ITC^DeltaCom") Interconnection Agreements with BellSouth provides:

In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of ITC^DeltaCom or BellSouth to perform any material terms of this Agreement, ITC^DeltaCom or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution Procedure set forth in Section 11.

(Exhibit 3, Excerpts from ITC^DeltaCom/BellSouth Interconnection Agreement §

15.4.)⁵ Although the *TRRO* undoubtedly effected dramatic changes to the understanding of the requirements of § 252, it is undisputed that nothing in the *TRRO* suggests a finding by the FCC that the change of law provisions in the parties' agreements are no longer in the public interest.

Notwithstanding the change of law provisions in its Interconnection Agreements⁶ with Joint Defendants or the plain language of the *TRRO* requiring

⁵ITC^DeltaCom's Interconnection Agreement with BellSouth also contains a provision post-dating the issuance of the D.C. Circuit's opinion in *USTA II* wherein the parties confirm that changes to the Agreement necessitated by *USTA II* (and ultimately imposed by the *TRRO*) will be implemented according to the change of law provision in § 15.4. (Dist. Ct. Docket No. 22, Supp. Appendix, Exhibit A, ITC^DeltaCom/BellSouth Interconnection Agreement, Attach. 2, § 1.1.) In addition, NuVox Communications, Inc, KMC Telecom Holdings, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Atlanta, LLC, all have a separate Abeyance Agreement with BellSouth, as part of their ongoing arbitration before the GPSC, which provides that changes of law resulting from the *TRO*, *USTA II* and its progeny will not be the subject of amendments to the existing Interconnection Agreements but will be incorporated into the new Interconnection Agreements that result from the ongoing arbitration. (Dist. Ct. Docket Nos. 33, 48 and 50). Therefore, while NuVox, KMC and Xspedius concur that the change of law provisions are not abrogated by the *TRRO*, they have a separate Abeyance Agreement which exempts them from amending their current interconnection agreements. The District court did not reach the issue of the Abeyance Agreement, concluding that matter was still "pending before the PSC, and this [the District] Court's decision does not affect the PSC's authority to resolve it." (District Court Order at 6). ITC^DeltaCom's Interconnection Agreement with BellSouth also contains a provision post-dating the issuance of the D.C. Circuit's opinion in *USTA II* wherein the parties confirm that changes to the Agreement necessitated by *USTA II* (and ultimately imposed by the *TRRO*) will be implemented according to the change of law provision in § 15.4. (Dist. Ct. Docket # 22, Supp. Appendix, Exhibit A, ITC^DeltaCom/BellSouth Interconnection Agreement, Attach. 2, § 1.1.)

⁶ There is no dispute that similar provisions are contained in the Interconnection Agreements of the other Joint Defendants. Those Agreements were filed with the District

negotiation of the terms and conditions needed to implement its findings, in a Carrier Notification dated February 11, 2005, BellSouth asserted its interpretation of the *TRRO*, claiming that “the FCC’s actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to ‘new adds’ for these former UNEs.” (Exhibit 4, 2/11/05 Carrier Notification.) BellSouth went on to state that “effective March 11, 2005, for ‘new adds,’ BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost (‘TELRIC’) rates or unbundled network platform (‘UNE-P’) and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.” (*Id.*) BellSouth further asserted that it would return any orders for service from carriers refusing to sign the “take or leave it” commercial agreements offered by BellSouth, which provide access to the same facilities formerly available as the UNE-P, but at much higher rates. (*Id.*; see also Exhibit 5, Edwards Letter; Exhibit 6, 3/21/05 Carrier Notification.)

Moreover, although the *TRRO* requires that CLECs be allowed to self-certify the size of the wire centers associated with orders for loops or transports, BellSouth sought to circumvent this process by publishing the list of wire centers it deemed to qualify for UNE orders. BellSouth later had to admit that its list was

Court at Docket No. 22, Joint Defendants’ Second Supplemental Appendix.

erroneous and that employed a flawed methodology. (Exhibit 15, 3/24/05 Notice.)

MCImetro Access Transmission Services, LLC (“MCI”) and other CLEC’s sought an emergency determination by the GPSC of whether the *TRRO* authorized BellSouth unilaterally and without negotiation to refuse to honor its Interconnection Agreements. Finding no support in the *TRRO* for BellSouth’s argument that the *TRRO* had effected an immediate abrogation of the contractual change of law provisions, the GPSC held that all parties were required to abide by the change of law provisions in their Interconnection Agreements to implement the terms of the *TRRO*. (Exhibit 7, (hereinafter “GPSC Ruling”) at 5-6.) The GPSC further held that it would resolve the questions of whether BellSouth might be entitled to a true-up and whether BellSouth was separately obligated to provide unbundled network elements to the CLECs under § 271 of the Act or under state law in the regular course of its docket. (*Id.* at 6-7.)

II. ARGUMENT

To obtain a stay of an injunction pending appeal, a party must demonstrate that “four familiar considerations[—]likelihood of success on the merits, risk of irreparable harm without relief, risk of injury to the party opposing the relief, and the public interest”—on the whole favor a stay. *Weng v. United States Att’y Gen.*, 287 F.3d 1335, 1337-38 & n.5 (11th Cir. 2002). Here, each factor is satisfied.

C. The District Court Erred in Finding That BellSouth was Likely to Succeed on its Argument that the TRRO Abrogated the Choice of Law Provisions in its Contracts.

BellSouth's obligation to negotiate the terms and conditions necessary to implement the provisions of the *TRRO* derives from two independent sources. First, BellSouth voluntarily entered into agreements with Joint Defendants that specifically detail how the parties will go about the work of incorporating into their Interconnection Agreements changes in terms and conditions necessitated by material changes in the law. BellSouth does not dispute that the *TRRO* is a "regulatory . . . action" that "materially affects . . . material terms of [the Interconnection] Agreements" within the meaning of the change of law provisions of the Interconnection Agreements. (Exhibit 8, BellSouth GPSC Opp'n at 3.) BellSouth does not dispute that some carriers attempted to open negotiations to amend their Interconnection Agreements as early as December 2004, nor dispute that such negotiations would have led to the implementation of reasonable and lawful terms, conditions, and rates.

BellSouth's sole argument in support of its contention that it is not obligated to enter into negotiations as required by the change of law provisions is that the *TRRO* somehow implicitly abrogated such provisions because it is "self

effectuating.”⁷ The GPSC emphatically rejected this argument, pointing out that BellSouth could not identify any statement in the *TRRO* purporting to make such an abrogation. (GPSC Ruling at 3-5.) Moreover, even conceding for the moment as the GPSC did that there exists a doctrine of law (the *Sierra-Mobile* doctrine⁸) that, in proper circumstances, might have permitted the FCC to accomplish such an abrogation, the GPSC found no indication in the text of the *TRRO* that the FCC had conducted the analysis required to defend a decision to directly impair the parties’ contractual rights—specifically, the change of law provision. (*Id.*)

The power available pursuant to the *Sierra-Mobile* doctrine is highly circumscribed. It requires specific findings as to each “particular” provision of the contract to be modified that such provision is “detrimental to the public interest,” accompanied by “adequate reasons for jettisoning the provisions.” *Western Union Tel. Co.*, 815 F.2d at 1503. Nothing in the *TRRO* even purports to be an effort to abrogate choice of law provisions and such abrogation cannot be accomplished through the negative inference employed by the District Court. Absent discussion

⁷ The *TRRO* does not state that it is “self-effectuating.” It merely states that the FCC believes the “impairment framework” it adopts is “self-effectuating,” (*TRRO* ¶ 3), i.e., capable of simple application across a number of differing circumstances.

⁸ Where it applies, “the *Sierra-Mobile* doctrine has been held to allow agencies to change contract rates when it finds them unlawful, see *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956), and to modify other provisions of private contracts when necessary to serve the public interest, see *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956).” *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

and a detailed weighing of the merits of the “particular provision” to be altered, “reiterat[ion] of rather conclusory arguments” regarding the public interest, cannot support a finding that the provision has been validly abrogated pursuant to the *Sierra-Mobile* doctrine.⁹ *Id.*

Although the *Sierra-Mobile* doctrine was only authority BellSouth identified in proceedings before the GPSC for the alleged abrogation of the Interconnection Agreements, BellSouth all but abandoned reliance upon the doctrine at the District Court, relying instead upon a singular citation to *United Gas Imp. Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). *Callery Properties*, however, does not advance BellSouth’s assertion that the *TRRO* dispensed with the parties’ change of law provisions. Reasoning that “[a]n agency, like a court, can undo what is wrongfully done by virtue of its order,” the Supreme Court determined that the Federal Power Commission had not exceeded its power in ordering gas “producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest.” *Id.* at 229-30. Nothing in *Callery Properties* suggests that the FCC may abrogate privately negotiated

⁹ Conceding that the *TRRO* contains no express abrogation of the change of law provisions, BellSouth insists that the “transition plan” outlined in the *TRRO* renders such abrogation implicit. Such an inference is not permitted by the *Sierra-Mobile* doctrine and in any event is negated by the *TRRO*’s own direction to the parties to implement its rules through § 252 negotiations.

contractual provisions, much less abrogate them with no reflection on the record of any intent to do so or that abrogation was in the public interest.

On multiple occasions in the past, the FCC imposed changes of law resulting from the same process of identifying the means by which to further the statutory intent of the Telecommunications Act and using the same style of mandatory language employed in the *TRRO*. See *First Report and Order*, 11 FCCR 15499, ¶ 410 (1996) (“We conclude that incumbent LECs must provide local switching as an unbundled element”); *Advanced Services Order*, 14 FCCR 4761, ¶¶ 40-43 (1999) (“We require incumbent LECs to make cageless collocation arrangements available. . .”); *TRO* ¶ 579 (“We require incumbent LECs to perform the necessary functions to effectuate such commingling upon request”). In each of these prior instances, which notably resulted in changes of law to the benefit of the CLECs, BellSouth insisted that these changes could not become effective until the parties had engaged in the negotiations contemplated by the change of law provisions in the parties’ Interconnection Agreements.¹⁰ BellSouth’s insistence on a different result here is pure self-interested duplicity.

¹⁰ As the GPSC noted in its Order, when AT&T tried to take advantage of a GPSC pricing decision prior to the time permitted under its change of law provision, BellSouth implored the Commission not to permit AT&T “to ignore, and thereby circumvent the effect of the very language it negotiated and entered into in its [Interconnection Agreement] with BellSouth” so as to “unilaterally change the terms and conditions of the [Agreement].” (GPSC Ruling at 5-6 (citing GPSC Docket No. 17650, Document No.

BellSouth's argument that the *TRRO* abrogated the negotiation requirements under the change of law provisions is untenable also since the second source of BellSouth's obligation to enter into good faith negotiations with Joint Defendants is the plain language of the *TRRO* itself. In directing the implementation of the unbundling decisions reflected in the *TRRO*, the FCC states at Paragraph 233 that it expects "incumbent LECs [such as BellSouth] and competing carriers will implement the Commission's findings as directed by section 252 of the Act. *Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.*" (*Id.* ¶ 233 (emphasis added).) The FCC further notes that "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes" and states its expectation that "parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order." (*Id.* (footnotes omitted).) This recognition by the FCC that the *TRRO* must be implemented through negotiated amendments to the existing Interconnection Agreements both negates any suggestion that the FCC intended to abrogate the terms of change of law provisions where they exist and independently confirms

68288 (BellSouth's Reply Brief) at 2.) Additional examples of BellSouth's insistence on rigid compliance with the change of law provisions to amend Interconnection Agreements to reflect even the most simple, straightforward changes in rates or other terms imposed by the FCC or state PSCs are set forth in the record. (*See* Exhibits 9-12.)

that the *TRRO* does not give BellSouth the right to unilaterally change the terms and conditions under which it leases elements of its network to Joint Defendants.

In light of the foregoing, there is little likelihood that BellSouth can succeed on the merits, much less meet the heightened showing required for issuance of a mandatory injunction. *Martinez v. Matthews*, 544 F.2d 1233, 1243 (5th Cir. 1976).

D. Bellsouth Has Not Shown that the Balance of Harms Favors Granting Injunctive Relief.

The injunction sought by BellSouth threatens injury to Joint Defendants and to consumers, allowing BellSouth to implement its refusal to provide access to elements of its network unless Joint Defendants enter into coerced “commercial agreements” with BellSouth.¹¹ Consumers who are currently being served by Joint Defendants will lose service or the opportunity to effect changes in their service, and Joint Defendants will lose the ability to provide service to new customers. This harm to Joint Defendants’ ability to serve their customers far exceeds any harm BellSouth, which is purely economic.

The only issue for BellSouth is the rate it can charge for certain network

¹¹ BellSouth’s offer to provide service under its unilateral commercial agreements does not mitigate this harm since companies signing those agreements will lose the benefit of *TRO* or *TRRO* rulings in their favor, will lose the opportunity to negotiate the availability of various elements of current technology and the terms for transfer from those agreements to other means of providing the service, will not have answers a myriad of implementation questions, and will suffer other impairments of their ability to provide telecommunication services to their customers. (See Exhibit 13, Decl. of Mary Conquest.)

elements, this issue is inherently subject to remedy by money damages and therefore does not constitute the type of irreparable harm necessary to support a preliminary injunction.¹² See, e.g., *Northeastern Florida Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) (“An injury is ‘irreparable’ only if it cannot be undone through monetary remedies.”). To the extent that BellSouth has made a showing of lost customers, these losses are exactly offset by the customers the CLECs will lose upon issuance of an injunction, and CLECs, unlike BellSouth, will completely lose their ability to add new customers and have their reputations injured in the process.

Furthermore, any loss of customers during the time the parties are effecting the rulings of the *TRRO* through the change of law provisions cannot legitimately be considered an undue injury to BellSouth. BellSouth negotiated the change of law provisions with the full knowledge that such provisions would allow it to reap the benefit of delay, often unwanted by the CLECs when the changes inured to their benefit, and that, in fairness, BellSouth would have to bear the consequences of such limited delay where the changes inured to BellSouth’s ultimate benefit. See *Sierra Pac. Power Co.*, 350 U.S. at 355 (“[A] contract may not be said to be either ‘unjust’ or ‘unreasonable’ simply because it is unprofitable”). As such,

¹² Moreover, the GPSC already has committed to giving consideration to whether BellSouth should receive a true-up in the course of the proceedings in the current docket.

BellSouth's claimed irreparable injury in the form of lost customers is, at best, an injury of its own making that needs no emergency remedy. Certainly such "injury," if established, cannot be shown to outweigh the harm that undoubtedly will befall Joint Defendants as a result of the preliminary injunction.

Moreover, the preliminary injunction imposes a particular harm on carriers who seek to provision high-capacity loops and transport from BellSouth. BellSouth has admitted that it lacks a methodology at present for accurately determining the number of lines present in a wire center. Without the negotiation between the parties contemplated by the *TRRO* and the interconnection agreements, egregious errors, such as the ones to which BellSouth already has admitted, are likely to continue to occur. The harm caused by these predictable errors will be born entirely by the CLECs as they and their customers suffer otherwise avoidable losses in service.

The public interest also favors a stay of the District Court's order. BellSouth has dragged its heels in engaging in negotiations with Joint Defendants to put in place mutually agreeable provisions resolving issues associated with implementation of the *TRRO*. "[E]quity aids the vigilant and not those who slumber on their rights." *NAACP v. NAACP Legal Defense & Educ. Fund, Inc.*,

That determination, once made, will be subject to judicial review. (GPSC Ruling at 6.)

753 F.2d 131, 137 (D.C. Cir. 1985). Accordingly, “[c]ourts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief.” *Nat’l Fire Ins. Co. v. Thompson*, 281 U.S. 331, 338 (1930). BellSouth’s lack of conscientiousness in pursuing its obligations, as well as its flagrant refusal to negotiate illustrates the error in the District Court’s ruling and the need for a stay pending appeal.

The public interest further weighs in favor of a stay as the preliminary injunction sought by BellSouth would dramatically change the negotiated terms of the Interconnection Agreements without adequate justification. “[T]he public interest does not favor forcing parties to a agreement to conduct themselves in a manner directly contrary to the express terms of the agreement.” *Frank B. Hall & Co. v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1025-26 (8th Cir. 1992). Such would be the precise result here, as the parties bargained and agreed to a particular procedure to implement amendments to their Interconnection Agreements prompted by changes of law.

III. CONCLUSION

For the foregoing reasons, the Court should stay the District Court’s Order pending appellate review and expedite this appeal.

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CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for ITC^DeltaCom, do hereby certify that I have served a copy of the pleading(s) hereinbelow specified via e-mail or regular mail to the following address(es):

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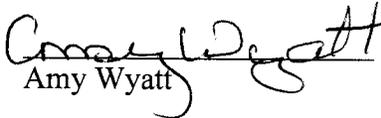
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